

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

## Respondent,

Case No. 2:09-cr-0240-KJD-PAL  
2:17-cv-0742-KJD

## ORDER

V.

BRIAN FIERRO,

Petitioner.

Presently before the Court is Petitioner Brian Fierro's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (#124/139). The Government filed responses in opposition and supplements (#126/141) to which Petitioner replied (#133/142). Also, before the Court is Petitioner's Motion for Leave to File First Amended Motion to Vacate, Set Aside, or Correct Conviction and Sentence under § 2255 (#137). Respondent filed a response in opposition (#139) to which Petitioner replied (#142

## I. Background

Fierro was found guilty after a jury trial on four counts of a superseding indictment. After appeal, the court entered Second Amended Judgment (#94) on : (1) Count One -- Interference with commerce by robbery (Hobbs Act Robbery); and (3) Count Two -- discharging a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c), specifically the interference with commerce by robbery charged in Count One of the superseding indictment; and (3) Count Three – felon in possession of a firearm. The court sentenced Fierro to one hundred and twenty (120) months imprisonment on Count One and Three each, to run concurrently. It sentenced Fierro to one hundred and twenty (120) months imprisonment on Count Two to be served consecutively to Counts One and Three, followed by five years of supervised release. In the instant motion, Fierro moves to vacate his § 924(c) conviction and sentence pursuant to

1      Johnson v. United States, 135 S. Ct. 2551 (2015) and United States v. Davis, 139 S. Ct. 2319,  
2      2336 (2019) , and requests that the court vacate his conviction.

3      II. Motion to Amend

4              Petitioner has also filed a motion for leave to amend his petition wishing to assert claims  
5      for relief under Rehaif v. United States, 139 S. Ct. 2191 (2019). The Rehaif claims would  
6      address his felon in possession of a firearm conviction, not otherwise at issue in the current §  
7      2255. The present motion is a second or third successive petition and was filed after receiving  
8      permission (#123) from the Ninth Circuit Court of Appeals to address claims found to be  
9      retroactive in cases on collateral review. The Order (#123) from the Ninth Circuit did not grant  
10     permission to raise other claims. Further, Rehaif has not been found to apply retroactively to  
11     cases on collateral review. See, e.g., In re Palacios, 931 F.3d 1314, 1315 (11th Cir. 2019) (Rehaif  
12     “did not announce a new rule of constitutional law”) (internal quotations omitted). At best, the  
13     Rehaif claim is premature. Accordingly, the Court denies Petitioner’s leave to amend.

14      III. Analysis

15              A federal prisoner may move to “vacate, set aside or correct” his sentence if it “was  
16      imposed in violation of the Constitution.” 28 U.S.C. § 2255(a). When a petitioner seeks relief  
17      pursuant to a right recognized by a United States Supreme Court decision, a one-year statute of  
18      limitations for seeking habeas relief runs from “the date on which the right asserted was initially  
19      recognized by the Supreme Court.” 28 U.S.C. § 2255(f)(3). The petitioner bears the burden of  
20      demonstrating that his petition is timely and that he is entitled to relief.

21              In Johnson, the United States Supreme Court held that the residual clause in the  
22      definition of a “violent felony” in the Armed Career Criminal Act of 1984, 18 U.S.C. §  
23      924(e)(2)(B) (“ACCA”), is unconstitutionally vague. 135 S. Ct. at 2557. The ACCA defines  
24      “violent felony” as any crime punishable by imprisonment for a term exceeding one year, that:  
25      (i) has as an element the use, attempted use, or threatened use of physical force against the  
26      person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise  
27      involves conduct that presents a serious potential risk of physical injury to another. 18 U.S.C. §  
28      924(e)(2)(B). Subsection (ii) above is known as the ACCA’s “residual clause.” Johnson, 135 S.

1 Ct. at 2555-56. The Supreme Court held that “increasing a defendant’s sentence under the clause  
2 denies due process of law.” Id. at 2557.

3 Fierro was not, however, sentenced pursuant to ACCA. Rather, he was convicted of  
4 violating 18 U.S.C. § 924(c) for discharging a firearm during and in relation to a crime of  
5 violence. Section 924(c)(3) provides:

6 the term “crime of violence” means an offense that is a felony and–

7 (A) has as an element the use, attempted use, or threatened use of  
8 physical force against the person or property of another, or

9 (B) that by its nature, involves a substantial risk that physical force  
10 against the person or property of another may be used in the course  
of committing the offense.

11 As with the ACCA, subsection (A) is referred to as the force or elements clause while subsection  
12 (B) is referenced as the residual clause. Fierro argues that Johnson is equally applicable to §  
13 924(c) cases and that his instant motion is timely as it was filed within one year of Johnson.  
14 Additionally, the Supreme Court has subsequently applied the principles first outlined in Johnson  
15 to the residual clause of § 924(c), holding “that § 924(c)(3)(B) is unconstitutionally vague.”  
16 Davis, 139 S. Ct. at 2336. Accordingly, the Court will now consider the motion as timely given  
17 the Supreme Court’s decision in Davis, extending the principles of Johnson to § 924(c), and will  
18 treat the motion as if filed seeking relief pursuant to Davis. Further, Defendant received  
19 permission from the Court of Appeals to file this second or successive § 2255 motion (#123).

20 **A. Hobbs Act Robbery**

21 Fierro asserts that his conviction is not subject to the provisions of § 924(c)(3) because  
22 the crime (Hobbs Act Robbery) underlying his 924(c) conviction does not constitute a “crime of  
23 violence.” He argues that his § 924(c) conviction and sentence is unconstitutional under Davis  
24 because a Hobbs Act Robbery cannot constitute a crime of violence without relying on the  
25 unconstitutional residual clause. The court disagrees.

26 Fierro argues that a Hobbs Act Robbery cannot categorically fall under the force or  
27 elements clause of § 924(c)(3)(A) because a Hobbs Act Robbery can be committed by any  
28 amount of force necessary to accomplish the taking, it does not necessarily require the use of

1 violent force. Prior to the Supreme Court's holding in Davis, the Ninth Circuit held that Hobbs  
2 Act “[r]obbery indisputably qualifies as a crime of violence” under § 924(c). United States v.  
3 Mendez, 992 F.2d 1488, 1491 (9th Cir. 1993). In 2016, the Ninth Circuit was confronted with  
4 essentially the same argument that Fierro raises here, that “because Hobbs Act Robbery may also  
5 be accomplished by putting someone in ‘fear of injury,’ 18 U.S.C. § 1951(b), it does not  
6 necessarily involve ‘the use, attempted use, or threatened use of physical force,’ 18 U.S.C. §  
7 924(c)(3)(A).” United States v. Howard, 650 Fed App'x. 466, 468 (9th Cir. 2016). The Ninth  
8 Circuit held that Hobbs Act Robbery nonetheless qualified as a crime of violence under the force  
9 clause:

10 [Petitioner's] arguments are unpersuasive and are foreclosed by  
11 United States v. Selfa, 918 F.2d 749 (9th Cir. 1990). In Selfa, we  
12 held that the analogous federal bank robbery statute, which may be  
13 violated by “force and violence, or by intimidation,” 18 U.S.C. §  
14 2113(a) (emphasis added), qualifies as a crime of violence under  
15 U.S.S.G. § 4B1.2, which uses the nearly identical definition of  
16 “crime of violence” as § 924(c). Selfa, 918 F.2d at 751. We  
17 explained that “intimidation” means willfully “to take, or attempt to  
18 take, in such a way that would put an ordinary, reasonable person in  
19 fear of bodily harm,” which satisfies the requirement of a  
20 “threatened use of physical force” under § 4B1.2. Id. (quoting  
21 United States v. Hopkins, 703 F.2d 1102, 1103 (9th Cir. 1983)).  
22 Because bank robbery by “intimidation”—which is defined as  
23 instilling fear of injury—qualifies as a crime of violence, Hobbs Act  
24 robbery by means of “fear of injury” also qualifies as [a] crime of  
25 violence.

26 Id.

27 The Court holds that a Hobbs Act Robbery constitutes a crime of violence under §  
28 924(c)(3)'s force clause. Under the elements set forth in the language of § 1951, Fierro's  
underlying felony offense (Hobbs Act Robbery) is a “crime of violence” because the offense has,  
“as an element the use, attempted use, or threatened use of physical force against the person or  
property of another.” 18 U.S.C. § 924(c)(3)(A); see also United States v. Jay, 705 F. App'x 587  
(9th Cir. 2017) (*unpublished*) (finding Hobbs Act Robbery a crime of violence). Davis is  
inapplicable here because Fierro's conviction and sentence do not rest on the residual clause of §  
924(c). The Court sees no reason to depart from the well-reasoned cases of nine other circuit  
courts of appeals that have found Hobbs Act Robbery to be a crime of violence after Johnson.

1       See United States v. Garcia-Ortiz, 904 F.3d 102, 106 (1st Cir. 2018); United States v. Hill, 890  
2 F.3d 51, 60 (2d Cir. 2018); United States v. Mathis, 932 F.3d 242, 265-67 (4th Cir. 2019);  
3 United States v. Buck, 847 F.3d 267, 274-75 (5th Cir. 2017); United States v. Gooch, 850 F.3d  
4 285, 292 (6th Cir. 2017); United States v. Fox, 878 F.3d 574, 579 (7th Cir. 2017); United States  
5 v. Fierro, 919 F.3d 1064, 1072 (8th Cir. 2019); United States v. Melgar-Cabrera, 892 F.3d 1053,  
6 1064-6 (10th Cir. 2018); In re Pollard, 931 F.3d 1318 (11th Cir. 2019).

7       As the Supreme Court found in Stokeling v. United States, 139 S. Ct. 544, 553 (2019),  
8 “Robbery . . . has always been within the category of violent, active crimes” that merit enhanced  
9 penalties under statutes like 924(c). As stated by the Supreme Court “Congress made clear that  
10 the ‘force’ required for common-law robbery would be sufficient to justify an enhanced  
11 sentence.” Id. at 551. Like the statute in Florida, Hobbs Act Robbery is “defined as common-law  
12 robbery.” United States v. Melgar-Cabrera, 892 F.3d 1053, 1064. Section 924(c) includes crimes  
13 that involve “physical force.” 18 U.S.C. § 924(c)(3)(A). Stokeling forecloses Petitioner’s  
14 argument that the “force” required for Hobbs Act Robbery does not meet the standard set by 18  
15 U.S.C. § 924(c)(3)(A).

16       Defendant argues that Hobbs Act Robbery fails to constitute a crime of violence under  
17 the elements clause because it does not categorically require the use of intentional force against  
18 the person or property of another, but instead, can be committed by causing fear of future injury  
19 to property, tangible or intangible. However, “[a] defendant cannot put a reasonable person in  
20 fear” of injury to their person or property without “threatening to use force.” United States v.  
21 Gutierrez, 876 F.3d 1254, 1257 (9th Cir. 2017). “[Robbery] by intimidation thus requires at least  
22 an implicit threat to use the type of violent physical force necessary” to satisfy the requirements  
23 of the elements clause. Id.; see also Estell v. United States, 924 F.3d 1291,1293 (8th Cir. 2019)  
24 (bank robbery by intimidation requires threatened use of force causing bodily harm). Like the  
25 court in Mathis, this Court sees no reason to discern any basis in the text of elements clause for  
26 creating a distinction between threats of injury to tangible and intangible property for the  
27 purposes of defining a crime of violence. 932 F.3d at 266. Therefore, Hobbs Act Robbery  
28 constitutes a crime of violence under the elements clause of Section 924(c).

1        **III. Certificate of Appealability**

2        To appeal this order, Fierro must receive a certificate of appealability. 28 U.S.C. §  
3        2253(c)(1)(B); Fed. R. App. P. 22(b)(1); 9th Cir. R. 22-1 (a). To obtain that certificate, he “must  
4        make a substantial showing of the denial of a constitutional right, a demonstration that ...  
5        includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the  
6        petition should have been resolved in a different manner or that the issues presented were  
7        adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 483-  
8        84 (2000) (quotation omitted). This standard is “lenient.” *Hayward v. Marshall*, 603 F.3d 546,  
9        553 (9th Cir. 2010) (en banc).

10       Given contrary holdings in other district courts in the Ninth Circuit, the Court cannot  
11       deny that other reasonable jurists would find it debatable that the Court's determination that  
12       Hobbs Act Robbery is a crime of violence pursuant to the force clause of § 924(c) is wrong. See  
13       United States v. Chea, No. 4:98-cr-40003-CW, 2019 WL 5061085 (N.D. Cal. Oct. 2, 2019);  
14       United States v. Dominguez, No. 14-10268 (9th Cir. argued Dec. 10, 2019). Accordingly, the  
15       court grants Defendant a certificate of appealability.

16       **IV. Conclusion**

17       Accordingly, IT IS HEREBY ORDERED Petitioner's Motion for Leave to File First  
18       Amended Motion to Vacate, Set Aside, or Correct Conviction and Sentence under § 2255 (#137)  
19       is **DENIED**;

20       IT IS FURTHER ORDERED that Petitioner Brian Fierro's Motion to Vacate, Set Aside,  
21       or Correct Sentence under 28 U.S.C. § 2255 (#124/139) is **DENIED**;

22       IT IS FURTHER ORDERED that the Clerk of the Court enter **JUDGMENT** for  
23       Respondent and against Petitioner in the corresponding civil action, 2:17-cv-0742-KJD, and  
24       close that case;

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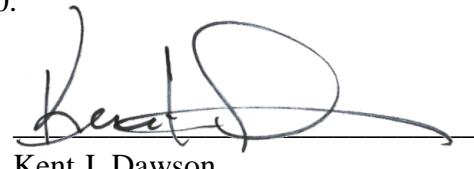
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1 IT IS FURTHER ORDERED that Petitioner is **GRANTED** a Certificate of  
2 Appealability.

3 DATED this 31st day of March 2020.

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Kent J. Dawson  
United States District Judge